IN THE SUPREME COURT OF THE STATE OF NEVADA

GILBERT JAY PALIOTTA, Appellant, vs. STATE OF NEVADA IN RELATION TO THE NEVADA DEPARTMENT OF CORRECTIONS; AND RENEE BAKER, WARDEN, Respondents.	CASE NO. 66664 District Court Case No.CF 1111054

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RESPONDENTS' ANSWERING BRIEF

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Respondents (State), by and through counsel, Nevada Attorney General Adam Paul Laxalt, and Clark G. Leslie, Senior Deputy Attorney General, respectfully submit their Respondents' Answering Brief.

PREAMBLE

This lawsuit and appeal is a transparent attempt by an inmate to obtain a preferential dietary benefit for personal, non-religious reasons where the religion at issue has no dietary constraints as was confirmed by the Master of the very religion (Thelema) and Lodge through which the Appellant, Gilbert Paliotta ("Paliotta") worships.

Paliotta has incorrectly asserted that the First Amendment and the Religious Land Use and Institutionalized Persons Act ("RLUIPA") mandate that the Nevada Department of Corrections provide a kosher meal to an inmate where his personal and philosophical interpretation of his religion incongruently incorporates Judaic dietary laws into his subjective belief system. No court has ever extended constitutional or statutory protections to such extremes nor should any court do so.

State is entitled to prevail even if it is assumed that Paliotta is sincere in his Thelema beliefs and where State concedes that the "central tenet" doctrine pertaining to Paliotta's dietary considerations is not dispositive. Simply put, neither the First Amendment nor RLUIPA permit individuals to self-define a religious tenet to include matters that are not rooted in a religious belief.

Whether one is Gentile or Jew, Pagan or Druid, Thelema or Asatru, mono- or poly-theistic, a religious adherent is not at liberty to engage in a smorgasbord approach to religion where one simply takes things he or she likes from other religions and then incorporate them into one's religious practices simply because, from a personal point of view, a practice seems worthwhile. This is particularly true in a prison setting.

The record below and this Brief will confirm that Paliotta cannot establish that the denial of a kosher meal to one who believes in Thelema violates the Free Exercise Clause of the First Amendment or creates a "substantial burden" to Paliotta's exercise of his religion in violation of RLUIPA. Thus, the denial of Paliotta's partial motion for summary judgment and the grant of State's motion for summary judgment by the district court were correct and, therefore, this appeal should be denied in its entirety.

I. JURISDICTIONAL STATEMENT

This Court has jurisdiction for Paliotta's appeal pursuant to NEV. R. APP. P. 3A(b) State agrees that Paliotta has exhausted his administrative remedies pursuant to the Prison Litigation Reform Act (42 U.S.C. § 1997(e)) and that he filed a timely Notice of Appeal.

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II. ISSUES

A. Did the district court correctly grant summary judgment to State and deny partial summary judgment to Paliotta where the Appellant was seeking a religious dietary accommodation that was a personal preference and not one rooted in religion?

B. Does the recent United State Supreme Court holding in *Holt v. Hobbs*, 574 U.S. __, 135 S.Ct. 853 (2015) have any applicability to the issues raised in this appeal (*see* Order Directing Response dated April 23, 2015)

III. STATEMENT OF THE CASE

Appellant Gilbert Jay Paliotta ("Paliotta") is an inmate incarcerated by the Nevada Department of Corrections ("NDOC"). Paliotta filed his Complaint with the Seventh Judicial District Court of the State of Nevada in and for the County of White Pine on November 28, 2011. The Complaint was filed pursuant to 42 U.S.C. § 1983 and alleged violations of the First Amendment, Fourteenth Amendment and the Religious Land Use and Institutionalized Persons Act (42 U.S.C. § 2000cc, *et seq.*)

Following discovery propounded by Paliotta and responded to by State, Paliotta filed his motion for partial summary judgment on or about March 14, 2013. State filed its cross-motion for summary judgment on November 19, 2013. The gravamen of both dispositive motions sought a ruling

pertaining to NDOC's denial of Paliotta's request for a religious dietary accommodation in the form of a kosher diet. Paliotta is not Jewish; rather, he practices a religion known as Thelema (*see infra*).

After both dispositive motions had been fully briefed the district court issued its "Order Denying Plaintiff's Motion for Partial Summary Judgment and Order Granting Defendants' Motion for Summary Judgment" on September 30, 2014. Paliotta filed his Notice of Appeal on October 6, 2014 citing the district court's Order of September 30, 2014 as the basis for the appeal.

IV. STATEMENT OF FACTS

Paliotta is a self-professed Thelema adherent. Thelema is a complicated set of magical, mystical and religious beliefs formed in the twentieth century by Aleister Crowley. More specifically, Thelema is based on *The Book of the Law* (also known as *Liber AL* and *Liber Legis*) that was reportedly dictated to Crowley in 1904 by a Holy Guardian Angel called Aiwass. Crowley is considered a prophet, and his works are the only ones considered canonical. A main tenet of this religion is "Do what thou wilt shall be the whole of the Law."[1]

The Complaint alleges that in March 2011 Paliotta asked the prison chaplain about obtaining a "traditional Egyptian diet" that would purportedly be in

[1] *See e.g.* "http://www.religioustolerance.org." and "http://thelema.org"; *see also* State's motion for summary judgment, Exhibit 3 at 2 (*Liber Al vel Legis*, Ch. III, page 1).

accordance with Thelmic beliefs. Paliotta asserts that the chaplain suggested he consider a kosher diet. Paliotta alleges that Thelema and Judaism "had deep religious ties." The NDOC denied all of Paliotta's requests (and grievances) to be placed on a kosher diet. *See* Complaint at 6 - 8.

In opposing Paliotta's motion for summary judgment and in State's cross-motion for summary judgment State noted that Paliotta claimed his Thelemic association was through a religious organization known as the Ordo Templi Orientes. *See* State's cross-motion for summary judgment, Exhibit 1, document provided by Paliotta in his Initial Disclosures, item (g), "Index of Documents."

State contacted Jon Sewell, the then-current Master of Horizon Lodge, Ordo Templi Orientis ("O.T.O."), the Order of Oriental Templars, in Seattle, Washington and asked if Thelema, in general, and the O.T.O., in particular, had any dietary requirements or affiliation with Judaism. *See* State's cross-motion for summary judgment, Exhibit 2.

After stating his qualifications relative to Thelema and his affiliations as the O.T.O. Lodge Master, Master Sewell then testified in his Declaration that, "Thelema does not require any particular religious diet. More specifically, Thelema does not require adherents to consume a Kosher [sic] diet." *Id.*, ¶ 6.

The Thelemic holy book, *Liber AL vel Legis* (*i.e., The Book of the Law of Thelma*, *see id.*, Exhibit 3) sets forth no demands for dietary adherence, certainly

nothing pertaining to kosher diets. However, some of the precepts espoused by *Liber AL vel Legis* are religious demands that are obviously and unquestionably impermissible in any prison in the United States. For example:

- "There is no law beyond Do what thou wilt." *Id.* at page 1;
- "Do what thou wilt shall be the whole of the Law." *Id.* Ch. I, at page 3, ¶ 40;
- "Be goodly therefore: dress ye all in fine apparel; *eat rich foods and drink sweet wines and wines that foam!* (Emphasis added)." *Id.* page 4, ¶ 51;
- "To worship me *take wine and strange drugs* whereof I will tell my prophet, & be drunk thereof! (Emphasis added)" *Id.*, Ch. II, page 6, ¶ 22.

The Initial Disclosures also provided precepts in Thelema such as: "Man has the right to kill those who would thwart these rights" and "Man has the right to eat what he will: to drink what he will . . ."

The district court Order gave little credence to the Declaration of Master Sewell because "intrafaith differences are common 'and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses.'" (Footnote omitted). Order at 10.

With respect, State would posit (*see infra*) that the district court misinterpreted the importance of Master Sewell's Declaration, *viz.*, the Declaration does provide strong support for the proposition that Paliotta's desire for a kosher diet is not "firmly rooted in a theological conviction." *See infra*.

The district court did grant summary judgment to State (and denied summary judgment to Paliotta) because:

(1) The Free Exercise Clause of the First Amendment is not applicable because Paliotta's belief that he is entitled to a kosher diet "[is not] based on a theological conviction but on a perceived social connection to Judaism [and] . . . does not qualify as a sincere religious belief under the *Seeger* test . . . " Order at 11;

(2) RLUIPA does not offer Paliotta protection because the denial of a kosher diet does not "substantially burden" the exercise of his religion; *Id.*;

(3) Qualified immunity was deemed a moot issue in view of the court's ruling. Order at 12.[2]

Paliotta has never expressed or demonstrated that if he is denied a kosher meal that such a deprivation somehow thwarts his ability to exercise his faith or will require him to abandon his Thelemic beliefs. Paliotta offers nothing below that would even remotely equate his situation with the inmate in *Warsoldier* who

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[2] The district court did not discuss the Fourteenth Amendment. However, Paliotta never alleged or asserted any facts that would place him in a class "similarly situated" to other non-Judaic inmates who are sometimes afforded a kosher meal. Paliotta's *personal* belief that his *religion* required kosher meals was correctly deemed to not be sincere. Paliotta merely alleged a social or heredity connection between Thelema and Judaism – an allegation insufficient to place him in the same class as non-Jewish inmates who are given kosher meals under far different and more appropriate circumstances. *See infra*.

poignantly and credibly alleged that a prison requirement requiring him to cut his hair would doom him to wander in a kind of Native American "purgatory" or a hellish world of lost spirits.

V. STANDARD OF REVIEW

A *de novo* standard of review is applied when this court addresses a question of law. *Holiday Ret. Corp. v. State, Div. of Indus. Relations,* 128 Nev. ___, 274 P.3d 759, 761 (2012); *Sierra Nev. Adm'rs v. Negriev,* 128 Nev. ___, 285 P.3d 1056, 1058 (2012). A grant of summary judgment is reviewed *de novo*. *Pegasus v. Reno Newspapers, Inc*., 118 Nev. 706, 713 (2002).

To withstand summary judgment, the nonmoving party cannot rely solely on general allegations and conclusions set forth in the pleadings, but must instead present specific facts demonstrating the existence of a genuine factual issue supporting his claims. NRCP 56(e); *see also Choy v. Ameristar Casinos, Inc.,* 127 Nev. Adv. Op. 78, 265 P.3d 698 (2011); *Wood v. Safeway, Inc.* 121 Nev. 724, 731, 121 P.3d at 1030–31 (2005).

This Court reviews a district court's factual determinations for clear error, *Valladares v. DMJ, Inc.,* 110 Nev. 1291, 1294, 885 P.2d 580 (1994); findings of fact will only be disturbed on appeal if they are clearly erroneous or unsupported by substantial evidence. *NOLM, LLC v. County of Clark,* 120 Nev. 736, 739, 100 P.3d 658 (2004).

In this vein, it has long and consistently been the rule in Nevada that a lower court decision will be upheld for any reason set forth in the record below. *See Rae v. All American Life and Cas. Co.*, 95 Nev. 920, 923, 605 P.2d 196 (1979) (decision upheld district court's refusal to set aside the judgment for reasons other than a lack of jurisdiction as stated by the District Court); *Dutchess Business Services, Inc. v. Nevada State Bd. of Pharmacy*, 124 Nev. 701, 723, 191 P.3d 1159 (2008) ("This court will not reverse a correct judgment 'simply because it was based on the wrong reason.'" (Footnote and citations omitted)); *Saavedra-Sandoval v. Wal-Mart Stores*, ___ Nev. Adv. Op. 55, 245 P.3d 1198, 1202 (2010) ("The district court reached the proper conclusion for the wrong reason.").

Pro se litigants are bound by the rules of procedure. *Ghazali v. Moran*, 46 F.3d 52, 54 (9th Cir. 1995) *citing King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). So called 'liberal construction' of pleadings "may not supply essential elements of that claim that were not initially pled." *See Duncan v. Donahoe*, *2, Slip Copy, WL 6455994 (D.Nev. 2014), *citing Bruns v. Nat'l Credit Union Admin.*, 122 F.3d 1251, 1257 (9th Cir. 1997).

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VI. SUMMARY OF ARGUMENT

The United States Constitution's First Amendment grants to citizens certain personal rights and freedoms that our Founding Fathers deemed essential to "secure the Blessings of Liberty to ourselves and our Posterity." The very first personal freedom mentioned in the First Amendment is one that directs Congress to "make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . "[3]

But with all rights and privileges afforded our citizens under the Constitution, we recognize that there are necessary limits that must be placed upon the freedoms expressed in the Bill of Rights. No one is permitted to shout "fire" in a crowded theatre; assemblies of persons who are advocating the violent overthrow of the country are proscribed; publishers cannot purposefully and with malice libel or slander another.

Religious practices, rites and rituals are also subject to restriction. For example, Mormons are not permitted to practice polygamy (*Reynolds v. United States*, 98 U.S. 145 (1878)) nor would the Constitution permit the practice of religions requiring infanticide, the killing of widows, or temple prostitution, as some religions have done in the past.

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[3] U.S. CONSTITUTION, amend. I.

It is upon this tableau of the ebb and flow, balance and counterbalance of religious freedom, on the one hand, and necessary restraint in the other that this appeal is presented to this Court. In this lawsuit a prisoner seeks to exercise his religion in a certain manner by being provided a kosher meal; the district court has deemed this desire a personal preference not rooted in a theological conviction. Instead, Paliotta's requested religious accommodation arises from a singular, subjective determination on his part that there may be a social connection between Thelema and Judaism.

Distilled to its essence, this appeal asks the question of what limits are lawful in the context of prison-based exercises of religious privileges. Respect for personal beliefs, reasonableness, resource allocation and logic all play a role in the analysis. Paliotta and State acknowledge that our laws provide for greater limitations upon the religious privileges afforded prisoners than free citizens. It is also correct that the complex demands of prisons necessarily require a certain level of deference to be afforded prison administrators.

In this matter, Paliotta demands that he be provided with a kosher meal although he is not Jewish and no Thelemic text or book even suggests that Thelemic practitioners adhere to any particular diet other than "rich foods" and "wine with froth." The Master of Paliotta's Lodge confirms that no Thelema adherent is required to comply with any dietary constraints.

The district court correctly discerned that State did not violate Paliotta's constitutional or statutory rights after a careful and thorough review of the facts and law. The dire consequences of granting this appeal cannot be understated. It is not hyperbole for State to argue that a grant of the relief Paliotta seeks would lead to unprecedented expansions of religious demands in prisons that would be benefit-based rather than rooted in religious theology.

It would be chaotic to allow inmates to self-define virtually any accommodation they preferred – simply because the inmate discerned an amorphous, undocumented connection between two very different religions. No such accommodation is demanded or required by the Constitution or statute.

VII. ARGUMENT

A. First Amendment Free Exercise Claim

(1) Two Basic Criteria for Free Exercise Clause Claim

Incarcerated persons retain their First Amendment right to free exercise of religion. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987). The free exercise right, however, is necessarily limited by the fact of incarceration, and may be curtailed in order to achieve legitimate correctional goals or to maintain prison security. *Id.*

"[T]o merit protection under the free exercise clause of the First Amendment," "[a] religious claim," "must satisfy two basic criteria."

Callahan v. Woods, 658 F.2d 679, 683 (9th Cir. 1981). "First, the claimant's proffered belief must be sincerely held[.]" *Id.* Second, "the claim must be rooted in religious belief, not in 'purely secular' philosophical concerns." *Id.*

Several sub-requirements become manifest under this test to determine the legitimacy of a Free Exercise claim.

For example, a prisoner must demonstrate that defendants have burdened the practice of his religion without any justification reasonably related to legitimate penological interests. *See Freeman v. Arpaio*, 125 F.3d 732, 737 (1997), abrogated on other grounds by *Shakur v. Schririo*, 514 F.3d 878, 884 (2008) (*citing Turner v. Safley*, 482 U.S. 78, 89 (1987)). It warrants emphasis that the prisoner bears the burden of proof on this element of his claim.

More specific to this appeal, prison authorities are not obligated to provide a special diet if an inmate is not sincere in his *religious* beliefs. *McElyea v. Babbitt*, 833 F.2d 196, 198 (9th Cir. 1987). Also, "[t]he right to exercise religious practices and beliefs does not terminate at the prison door. The free exercise right, however, is necessarily limited by the fact of incarceration, and may be curtailed in order to achieve legitimate correctional goals or to maintain prison security." *McElyea*, 833 F.2d at 197; *see also O'Lone*, 482 U.S. at 348.

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(2) Paliotta Has Not Demonstrated Sincerity of a Belief That is Religious in Nature

One of the tasks of the court "is to decide whether the beliefs professed by (petitioners) . . . are sincerely held and whether they are, in (their) own scheme of things, religious." *See United States v. Seeger*, 380 U.S. 163, 185 (1965).

In this regard, an important distinction and comment must be made: State is not arguing that Paliotta is not a sincere adherent of Thelema or that he believes that Thelema has a *social connection* to Judaism (*see* Complaint at 7). The disconnect occurs when Paliotta then argues that this non-religious relationship supports his requested relief for a kosher meal. Under summary judgment law and procedure, all inferences are given in favor of the non-moving party and Paliotta has alleged that he believes that a social connection exists between Thelema and an Egyptian diet and Judaism.

But this is not the alpha and omega of the analysis. In theory, a Christian inmate could be sincere in his belief that he must seek the use of a Native American sweat lodge to achieve the purification described in the *Bible*;[4] a Baptist prisoner could sincerely argue that he has adopted the Santarian ritual of animal

[4] *See e.g.* Luke 2:22: "And when the days of her purification according to the law of Moses were accomplished, they brought him to Jerusalem, to present him to the Lord"; Acts 21:26: "Then Paul took the men, and the next day purifying himself with them entered into the temple, to signify the accomplishment of the days of purification, until that an offering should be offered for every one of them." http://kingjamesbibleonline.org.

sacrifices because they are mentioned in the *Bible*;[5] and so forth. But, no court would command a prison to accommodate these hypothetical requests simply because an inmate made a personal and dubious connection with two tenets from different religions.

Jewish inmates are granted kosher meals and Muslim prisoners partake in meals that do not include pork because of long-standing, well documented dietary restrictions in their respective religions. Millennia Jewish practitioners have adhered to strict kosher meals; since its beginning, Islam has forewarned its believers from eating pork.[6]

With Thelema, however, diet plays virtually no role in the religion save for exhortations commanding a believer to consume unhealthy "rich food" and imbibe in "wine with froth" – both being food and drink that are not permitted to be consumed by NDOC inmates.

Merely deeming a practice "religious" does not make it such. *Moore-King v. County of Chesterfield, Va.*, 819 F.Supp.2d 604, 623 (E.D.Va. 2011) ("[s]imply calling one's practices a religion does not make those practices part of a religion. Psychic Sophie could call her office the Church of Mike Mussina [a major league pitcher for the Baltimore Orioles], but that does not make it a religion.")

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[5] *See e.g.* Genesis 4:4; Exodus 29:38 – 46 (instruction about animal sacrifices).

[6] *Quran*, Al-Baqara 2:173.

In *United States v. Kuch*, 288 F.Supp. 439 (1968) the court denied the protection of the First Amendment to the defendant who claimed her Neo-American Church demanded that she ingest psychedelic drugs. The court in *Kuch* wisely noted: "Those who seek the constitutional protections for their participation in an establishment of religion and freedom to practice its beliefs must not be permitted the special freedoms this sanctuary may provide merely by adopting religious nomenclature and cynically using it as a shield to protect them." *Kuch*, 288 F.Supp. at 443.

Defendant Kuch pointed to studies that showed some "religious implications" that arose from psychedelic drug use. She also documented the use of sacred mushrooms for over 2,000 years among various Mexican faiths. However, and key to this appeal, was the court's finding that "What is lacking in the proofs received as to the Neo-American Church is any solid evidence of a belief in a supreme being, a religious discipline, a ritual, or tenets to guide one's daily existence." *Id.* at 444. The court concluded by stating: "It is clear that ***the desire to use drugs and to enjoy drugs for their own sake***, regardless of religious experience, is the coagulant of this organization and the reason for its existence (emphasis added)." *Id.*

This is precisely what Paliotta presents to this Court in his appeal: a desire to adopt another religion's dietary regimen without any reference to a Thelemic

religious tenet in support whatsoever but, instead, a *personal* desire to enjoy a far more desirable prison menu than the usual prison fare.

A second distinction was also noted by the *Kuch* court: "The Constitution protects the right to have and to express beliefs. It does not blindly afford the same absolute protection to acts done in the name of or under the impetus of religion." *Leary v. United States*, 383 F.2d 851, 859 (5th Cir. 1967), *rehearing denied*, 392 F.2d 220 (1968), *cert. granted*, 392 U.S. 903, 88 S.Ct. 2058, 20 L.Ed.2d 1362 (June 10, 1968).[7]

This policy is necessary to avoid insincere requests for religious meals and to preclude prisoners from being "free to assert false religious claims that are actually attempts to gain special privileges or to disrupt prison life." *Carson v. Riley*, WL 2590134 (W.D.Mich. 2009) *citing Ochs v. Thalacker*, 90 F.3d 293, 296 (8th Cir. 1996).

This analytical construct leads to one of the cornerstones of State's argument:

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[7] *Leary* involved the famous (or infamous) Harvard professor Timothy Leary relative to his use and promotion of psychedelic drugs. The *Leary* court aptly began its opinion by stating: "Thus the First Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be (citation omitted)." *Leary*, 383 F.2d at 859 (reversed on other grounds). No one is arguing Paliotta's right to think or believe that a kosher diet is consistent with Thelema; however, the First Amendment does not compel that he be granted the freedom to demand such a dietary accommodation in the absence of a religious predicate.

> Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, ***the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests***.

Wisconsin v. Yoder, 406 U.S. 205, 215-216 (1972) (emphasis added).

The safety, security and order of a prison militates against permitting inmates to self-declare whatever religious belief strikes them as being expedient or preferable at any one moment. For a practice to be "rooted in religion" the religious expression must be "inseparable and interdependent" from the religion in question. *Yoder*, 406 U.S. at 216.[8] Paliotta has not demonstrated that the kosher meals he desires are either inseparable or interdependent of Thelema adherence.

The Ninth Circuit has held that inmates "have the right to be provided with food sufficient to sustain them in good health that satisfies the dietary laws of their religion." *Ward v. Walsh*, 1 F.3d 873, 877 (9th Cir. 1993). These protections, however, are necessarily limited by the fact of incarceration, and can be restricted to achieve legitimate penological goals and maintain prison security. *See Shakur*, 514 F.3d at 884; *O'Lone*, 482 U.S. at 348.

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[8] In *Yoder*, Amish parents were challenging Wisconsin's mandatory attendance laws for children that required all children to attend school until they were sixteen years of age; Amish permitted their children to attend state-operated grammar schools but would then remove their children after the eighth grade to avoid interference with their religious beliefs. The United States Supreme Court reversed the lower courts' orders requiring these children to attend compulsory high school.

As State argued below, this issue was presented to the courts in Massachusetts when a Catholic inmate sought kosher meals. *Guzzi v. Thompson*, 470 F.Supp.2d 17 (D.Mass. 2007) (unreported decision vacated after settlement). The court in *Guzzi* began by stating: "The complication in this case is that Guzzi does not allege that he follows Judaism. He describes himself as an Orthodox Catholic." *Guzzi*, 470 F.Supp. at 25. The court then made the key point that:

> "While keeping kosher within the practice of various sects of Judaism constitutes a religious exercise, ***keeping kosher itself is not a religion.*** As a result, Guzzi cannot assert a protected right to keep kosher solely by demonstrating a sincere belief in the need to follow that religious practice. ***Guzzi's purely subjective ideas of what his religion requires will not suffice*** (emphasis added)(citations omitted)."

Id. at 25-26 *citing, in part, Yoder*, 406 U.S. at 215–16 and noting that the United States Supreme Court recognized for purposes of a First Amendment inquiry that individuals are not free to define religious beliefs solely based upon individual preference.

Guzzi referenced a similar issue in *Starr v. Cox*, WL 1575744 (D.N.H. June 5, 2006) (slip copy). In *Starr*, the court rejected an inmate's desire to practice Tai Chi as a protected religious exercise. Inmate Starr admitted he was not a believer in Taoism but, nonetheless, was challenging the prison's denial of his request to

practice the physical art of Tai Chi.[9] As with kosher meals, the *Starr* court correctly found that "the practice of Tai Chi, by itself, is not recognized as a religion." *Starr* at *3. Tai Chi was thus not deemed an integral part of Starr's religious beliefs and denying this practice would not be a substantial burden under RLUIPA. *See below.*

Thus, Paliotta cannot support a Free Exercise claim where the practice at issue is not religious in nature. Adopting another religion's dietary precepts where no historical or theological underpinning is present is not protected conduct under the First Amendment.

B. RLUIPA

(1) Applicable Law

Plaintiff brings his claim under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq*., which provides in relevant part:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution... even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person
>
> (1) is in furtherance of a compelling governmental interest; and

[9] "Tai Chi is a slow movement form of art that is primarily practiced for health benefits and exercise." *Starr*, at n. 2.

> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc–1(a).

"Religious exercise" is defined as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc–5(7)(A). "A person may assert a violation of [RLUIPA] as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. § 2000cc–2(a).

The Ninth Circuit has set out four factors for the RLUIPA analysis: (1) what "exercise of religion" is at issue; (2) whether there is a "burden," if any, imposed on that exercise of religion; (3) if there is a burden, whether it is "substantial;" and (4) if there is a "substantial burden," whether it is justified by a compelling governmental interest and is the least restrictive means of furthering that compelling interest. *Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1033 (9th Cir. 2007), *aff'd en banc*, 535 F.3d 1058, 1068 (9th Cir. 2008).

To establish an RLUIPA violation, the plaintiff bears the initial burden to prove that the defendants' conduct places a "substantial burden" on his "religious exercise." *Warsoldier v. Woodford*, 418 F.3d 989, 994 (9th Cir. 2005). Once the plaintiff establishes a substantial burden defendants must prove that the burden both furthers a compelling governmental interest and is the least restrictive means of achieving that interest. *Warsoldier*, 418 F.3d at 995.

(2) RLUIPA Was Not Violated

In this appeal, the record clearly demonstrates that Paliotta has not alleged nor could he ever prove that a denial of kosher meals would be a "substantial burden" to the exercise of his religious beliefs.

State asks the Court to compare Paliotta's non-specific, unauthenticated, self-serving allegations pertaining to burden with the proof offered by the inmate in *Warsoldier*. Warsoldier, a Cahuilla Native American, was an inmate at Adelanto Community Correctional Facility in California. He was found guilty of violating prison policies that regulated the length of inmate's hair that, for male inmates, was not permitted to be longer than 3 inches in length.

Warsoldier established, *without challenge,* that his religious faith teaches that hair symbolizes and embodies the knowledge a person acquires during a lifetime and that hair may be cut only upon the death of a close relative. Warsoldier maintained his hair long because he believed that cutting his hair would cost him his wisdom and strength. He further stated without evidence to the contrary that if he were to cut his hair, he would be unable to join his ancestors in the afterlife and, instead, the deceased members of his tribe will subject him to taunting and ridicule. Except upon his father's death in 1980, Warsoldier had not cut his hair since 1971. *Warsoldier*, 418 F.3d at 991–92.

This poignant and persuasive presentation is a far cry from the amorphous claims of "burden" offered by Paliotta. Where in Thelema history or liturgy is there any suggestion that a Thelema's failure to follow a specific diet will doom him or her to obloquy or rejection?

Although RLUIPA does not define "substantial burden," the Ninth Circuit has stated that a substantial burden is one that is "'oppressive' to a 'significantly great' extent . . . . A 'substantial burden on 'religious exercise' must impose a significantly great restriction or onus upon such exercise." *Warsoldier*, 418 F.3d at 995 (*quoting San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004)). The burden must be more than an inconvenience. *Navajo Nation*, 479 F.3d at 1033 (internal quotations and citations omitted).

A review of case law demonstrates that "substantial burden" has been held as one that:

- "Impose[s] a significantly great restriction or onus upon such a [religious] exercise. *See Warsoldier,* 418 F.3d at 995;
- Pressures an inmate to abandon his religious beliefs. *See Shakur*, 514 F.3d at 889;
- Has a "tendency to inhibit" religious exercise. *See Shebert v. Verner*, 374 U.S. 398 (1963);

- Puts "substantial pressure on an adherent to modify his behavior and violate his beliefs." *See Hobbie v. Unempl. App. Comm. of Florida,* 480 U.S. 136, 141 (1987); and,
- Coerces individuals into acting contrary to their religious beliefs. *See Lyng v. Northwest Indian Cemetery Protective Ass'n.*, 485 U.S. 439, 450 (1988).

A substantial burden must place more than an inconvenience on religious exercise; it must be of a nature that is coercive in nature such that it forces adherents to "forego religious precepts" or "pressure that mandates religious conduct." *See Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214, 1227 (11th Cir. 2004).

Nothing in the record below even remotely suggests that Paliotta will experience any such burden if he is denied kosher meals. Having to eat standard prison meals will neither cause Paliotta to abandon his religious beliefs nor will eating prison food force Paliotta to modify his religious behavior. A denial of kosher meals will not prevent Paliotta "from engaging in [religious] conduct or having a religious experience." *See Navajo Nation*, 479 F.3d at 1033 (internal citations omitted).

Of importance, "[c]ourts are expected to apply RLUIPA's standard with due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security

and discipline, consistent with consideration of costs and limited resources." *Hartmann v. Cal. Dep't. of Corr*., 707 F.3d 1114, 1124 (9th Cir. 2013) (internal quotation marks and citation omitted).

In recalling State's earlier concerns about inmates abusing dietary policies if Paliotta were granted the relief he seeks in this appeal it merits recalling that, "Under RLUIPA, [the plaintiff] bear[s] the initial burden of persuasion on whether [a][p]olicy 'substantially burdens' [his or her] 'exercise of religion.'" *Hartmann*, 707 F.3d at 1124 (*citing* 42 U.S.C. § 2000cc–2(b)). Thus, the court must begin by "identifying the 'religious exercise' allegedly impinged upon.'" *Greene*, 513 F.3d 982, 987 (9th Cir. 2008).

In this matter, there is no "religious exercise" at issue because "kosher" is not a religion. *See Guzzi* and *Starr, supra.* The religion before this Court is Thelema and the practice under scrutiny, kosher meals is not based upon Thelema religious precepts or theology. Once again, Paliotta has failed to fulfill his burden of proof. He cannot establish that the mere denial of a kosher meal will "substantially burden" his practice of Thelema notwithstanding its precept of exercising one's "will" without restraint that is patently anathema to the prison experience.

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C. Fourteenth Amendment

As stated above, the district court did not issue findings or rulings on Paliotta's Fourteenth Amendment Claim – presumably one based on equal protection – but this allegation is easily disposed of. In essence, Paliotta argues that other non-Jewish inmates are granted kosher meals, therefore, the prison's denial of his request for kosher meals as a Thelema is a violation of equal protection.

"The Equal Protection Clause requires the State to treat all similarly situated people equally." *Hartmann*, 707 F.3d at 1123, *citing City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). "This does not mean, however, that all prisoners must receive identical treatment and resources." *Hartmann*, 707 F.3d at 1123 (citations omitted). The Plaintiff must establish that "the defendants acted with an intent or purpose to discriminate against [him] based upon membership in a protected class (citations and internal quotation marks omitted)." *See also Patel v. U.S. Bureau of Prisons*, 515 F.3d 807 (8th Cir. 2008).

Also, the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). The Equal Protection Clause of the Fourteenth Amendment prohibits invidious discrimination against prisoners based on a protected status. *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974).

To state a viable claim under the Equal Protection Clause, however, a prisoner "must plead intentional unlawful discrimination or allege facts that are at least susceptible of an inference of discriminatory intent." *Byrd v. Maricopa County Sheriff's Dep't*, 565 F.3d 1205, 1212 (9th Cir. 2009) (*quoting Monteiro v. Tempe Union High School District*, 158 F.3d 1022, 1026 (9th Cir. 1998)). "Intentional discrimination means that a defendant acted at least in part because of a plaintiff's protected status." *Serrano v. Francis*, 345 F.3d 1071, 1082 (9th Cir. 2003) (*quoting Maynard v. City of San Jose*, 37 F.3d 1396, 1404 (9th Cir. 1994)).

In this appeal, Paliotta cannot demonstrate either element essential to meeting his burden, to wit: Paliotta has not alleged facts that would place him in the same class as other non-Jewish inmates who receive kosher meals, and; Paliotta has not demonstrated a discriminatory intent by the prison.

In the first instance, Paliotta fails to identify any specific inmate who is non-Jewish but receives a kosher meal. State readily admits that some inmates meet this description but would also add that these inmates have established to the satisfaction of NDOC's Administrative Regulation 800 that there is a religious or theological basis for their dietary accommodation. For example, inmates claiming to be Buddhist can point to a religious history of basing its vegetarianism on Dharmic concepts of *ahimsa* (non-violence). A Thelema practitioner who is

attempting to adopt a Jewish dietary restriction is not in the same class as other inmates who have demonstrated a theological connection to their food accommodations.

Also, the very fact (as alleged by Paliotta) that some non-Jewish inmates are granted kosher meals when they demonstrate a religious need that would be substantially burdened if not accommodated is evidence of the prison's lack of discriminatory intent *vis a vis* kosher meals and non-Jewish inmates. As Paliotta himself asserted (Complaint at 3-7), the prison chaplain suggested he request kosher meals as an alternative to the "Egyptian diet" Paliotta claims is part of Thelemic beliefs. It was only when Paliotta could not provide a religious nexus between Thelema and dietary requirements that he was denied a kosher meal.

D. *Holt v. Hobbs*

The Court's "Order Directing Response" also requested that State comment upon the recent United States Supreme Court decision in *Holt v. Hobbs*, 574 U.S. __, 135 S.Ct. 853. In *Holt* an inmate who was a devout Muslim was prohibited from growing a one-half inch beard in accordance with his religious beliefs. *Holt* argued that this prison restriction was in violation of RLUIPA because the regulation substantially burdened the exercise of his religion.

The essence of the prison's argument was that the facial hair policy was to deter an inmate from disguising his appearance for purposes of deception or

escape. Holt successfully established that he was a sincere believer in Islam and that facial hair was an essential part of his religious beliefs.

Holt has no bearing on the issues before the Court in this matter. *Holt* was decided as it was because the plaintiff-inmate made a prima facie case establishing he was engaged in a religious exercise as a sincere believer. The burden under RLUIPA then shifted to the prison to establish that the facial hair policy was the "least restrictive means" of fulfilling its need to avoid identity fraud and escapes by inmates.

The prison was unable to meet this shifted burden. The *Holt* court found that alternative means existed (*i.e.*, pre- and post-beard photographs) to avoid the dangers of facial hair and that the prison incongruently permitted other forms of facial hair (*e.g.* moustaches) or the shaving and growing of hair on an inmate's head.

The "least restrictive means" burden is not an issue here. There is no alternative to either kosher meals or standard prison fare. The danger of inmates abusing food accommodations or otherwise gaining special privileges as mentioned by the court in *Carson*, *supra* is the concern in this matter.

"While the First Amendment affords many protections, it does not give to prisoners the right to micromanage a prison's dining facility." *Green v. Harry*, WL 1257920, *9 (W.D.Mich. 2010) (objection to report and recommendation sustained

on other grounds). This is the issue in this appeal, not the least restrictive means. Therefore, *Holt* has no application to the analysis herein.

VIII. CONCLUSION

Paliotta is not permitted to self-define his religious needs by the *ad hoc* approach of adopting accommodations he finds preferable to his living circumstances. The religion of Thelema has no dietary requirements whatsoever.

Thus, no Free Exercise, RLUIPA or Equal Protection right is abridged when a prison denies a kosher meal, a Jewish dietary restriction, to an inmate who is an avowed Thelema.

Therefore, State respectfully requests that this appeal be denied in its entirety.

Respectfully submitted this 21st day of May 2015.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on May 21, 2015.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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s/ Sandra Geyer
Sandra Geyer, an employee of the office
of the Nevada Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 14 pt. Times New Roman type style.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 6,668 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

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sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 21st day of May 2015.

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